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**FEDERAL ELECTION COMMISSION**  
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**FIRST GENERAL COUNSEL'S REPORT**

Pre-MUR: 520  
DATE COMPLAINT FILED: May 12, 2011  
DATE OF NOTIFICATION: May 19, 2011  
LAST RESPONSE RECEIVED: June 24, 2011  
DATE ACTIVATED: July 5, 2011

**EXPIRATION OF SOL:**

Earliest: April 7, 2013  
Latest: July 15, 2013

**COMPLAINANT:**

U.S. Senate Select Committee on Ethics

**RESPONDENTS:**

John E. Ensign  
Michael Ensign  
Sharon Ensign  
Ensign for Senate and Lisa Lisker in her official  
capacity as treasurer  
Battle Born Political Action Committee and Lisa  
Lisker in her official capacity as treasurer

**RELEVANT STATUTES:**

2 U.S.C. § 431(8)(A)(ii)  
2 U.S.C. § 434(b)  
2 U.S.C. § 441a

**INTERNAL REPORTS CHECKED:**

Disclosure Reports

**FEDERAL AGENCIES CHECKED:**

U.S. Senate Select Committee on Ethics

**I. INTRODUCTION**

After a 22-month investigation, the U.S. Senate Select Committee on Ethics (the "Senate Ethics Committee") concluded there was "substantial credible evidence" that part of an April 7, 2008, payment of \$96,000 from a trust account controlled by Michael and Sharon Ensign to Cynthia Hampton and members of Hampton's family was a severance and therefore constituted

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1 an unlawful and unreported campaign contribution.<sup>1</sup> Cynthia Hampton had been the treasurer of  
2 two political committees associated with former Senator John E. Ensign—Ensign for Senate,  
3 Senator Ensign's authorized candidate committee (the "Committee"), and the Battle Born PAC;  
4 Senator Ensign's leadership PAC (the "PAC") (collectively the "Ensign Committees")—but had  
5 to leave that position after she and Senator Ensign revealed their extra-marital affair to their  
6 families.<sup>2</sup> On May 12, 2011, the Senate Ethics Committee referred the matter to the Commission  
7 (the "Referral").<sup>3</sup>

8 In 2010, before the Referral, the Commission considered these allegations in a complaint-  
9 generated matter, MUR 6200 (Ensign). In connection with that matter, Senator Ensign and his  
10 parents, Michael and Sharon Ensign, each filed sworn affidavits with the Commission stating  
11 that the payment was not a severance but a gift. They represented that the payment was a gift  
12 from Michael and Sharon Ensign to the Hampton family made "out of concern for the well-being  
13 of long-time family friends" after learning of the affair.<sup>4</sup> The Commission relied on the veracity  
14 of those sworn affidavits—which at the time provided the Commission with the "only direct  
15 evidence of [the Ensigns'] intent" in making the payment—and concluded that the affidavits

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<sup>1</sup> Special Counsel's Report of the Preliminary Inquiry Concerning Senator John E. Ensign (May 10, 2011) (the "Report"), available at <http://ethics.senate.gov/public/index.cfm/pressreleases?id=451c2d6e-643f-4026-b7c4-3f6587fcc2dc>.

<sup>2</sup> Cynthia Hampton was the Treasurer for the Ensign Committees at all relevant times. After the activities giving rise to this matter, Lisa Lisker replaced Hampton as Treasurer for both committees. Accordingly, Lisker, in her capacity as treasurer, was identified as a Respondent in this matter. See Statement of Policy Regarding Treasurers Subject to Enforcement Proceedings, 70 Fed. Reg. 3 (Jan. 3, 2005).

<sup>3</sup> Letter from Senate Ethics Comm. to Acting Gen. Counsel, FEC (May 12, 2011). In a Supplement to the Referral, the Ethics Committee provided the Commission with the Report and additional evidence on December 20, 2011. See Letter from John Sassaman, Senate Ethics Comm. Chief Counsel, to Audra Hale-Maddox, Att'y, FEC (Dec. 20, 2011).

<sup>4</sup> Michael Ensign Aff. ¶ 6; Sharon Ensign Aff. ¶ 6.

1 supported a conclusion that the payment was a gift.<sup>5</sup> On that basis, the Commission exercised its  
2 prosecutorial discretion to dismiss the complaint, explaining, "[I]t is doubtful that an  
3 investigation would produce any additional evidence that would contradict or outweigh" the  
4 affidavits.<sup>6</sup>

5 The Senate Ethics Committee have now provided  
6 the Commission with substantial new evidence that they obtained during their respective  
7 investigations. This evidence, newly available to the Commission, includes  
8 the sworn deposition testimony of two Respondents, the sworn deposition  
9 testimony of others with direct personal knowledge of the relevant events, and numerous relevant  
10 documents. This new evidence casts considerable doubt on the credibility of the Ensigns'  
11 affidavits. And this new evidence supports the conclusion that part of the payment—\$72,000—  
12 was meant, among other things, to compensate Cynthia Hampton for the termination of her  
13 employment as Treasurer of the Ensign Committees.

14 Because a third party's payment of a political committee's costs for employee salaries,  
15 benefits, and expenses, including an employee's severance, is a contribution under the Federal  
16 Election Campaign Act (the "Act"), the \$72,000 in severance payments to Cynthia Hampton  
17 constituted an excessive unreported contribution to the Ensign Committees. Accordingly, we  
18 recommend that the Commission open a matter under review ("MUR"), find reason to believe  
19 that the Respondents violated the Act as detailed in this Report, and enter into pre-probable cause  
20 conciliation.

<sup>5</sup> See Statement of Reasons, Comm'rs Petersen, Bauerly, Hunter, McGahn & Weintraub at 10-11, MUR 6200 (Ensign) (Nov. 17, 2010) ("SOR").

<sup>6</sup> *Id.*

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1    **II.    FACTUAL SUMMARY**

2            Senator Ensign was elected to the U.S. Senate in 2000 and was re-elected in 2006.

3    Cynthia Hampton became the assistant treasurer of the Committee in June 2004 and replaced the  
4    former treasurer after the 2006 election. She also had been an assistant treasurer of the PAC, and  
5    was named its treasurer in February 2008.<sup>7</sup> Cynthia Hampton's salary for her treasurer positions  
6    with the Committee and the PAC was "approximately \$50,000 a year."<sup>8</sup> Douglas Hampton, her  
7    husband, served as Senator Ensign's Administrative Assistant and Co-Chief of Staff from  
8    November 2006 to April 2008.<sup>9</sup> His annual salary was between \$160,000 and \$170,000.<sup>10</sup>

9            The Hampton family and Senator Ensign and his wife Darlene Ensign had a close  
10    personal relationship for many years. Cynthia Hampton and Darlene Ensign were friends in high  
11    school and later introduced their husbands to each other.<sup>11</sup> After the Hampton family moved to  
12    Las Vegas in 2004, the families resided in adjacent neighborhoods, spent a great deal of time  
13    together, sent their children to the same private school,<sup>12</sup> and the families were described by  
14    others as "best friends."<sup>13</sup>

15            The families' financial circumstances, however, were very different. Senator Ensign's  
16    father had been a successful businessman and provided Senator Ensign with substantial financial

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7            *See* Sen. Ensign Resp. at 3; Report at 10-11.

8            *See* Cynthia Hampton Dep. at 73 (Mar. 21, 2011).

9            *See id.* at 51;

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11            Cynthia Hampton Dep. at 20-24.

12            *Id.* at 40-41, 52, 58-59.

13            Michael Ensign Dep. at 44 (Mar. 16, 2011) ("They were always there. They were best friends. And the kids were best friends . . . . They went to school together, were on the golf team together.")

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1 support.<sup>14</sup> Senator and Darlene Ensign repeatedly gave the Hamptons financial help, including  
2 refinancing the Hamptons' home in 2004 and 2006, paying the private school tuition of the  
3 Hampton children, and funding expensive golf outings.<sup>15</sup>

4 **A. The Negotiation of a Severance as Part of an "Exit Strategy"**

5 In or around December 2007, Senator Ensign and Cynthia Hampton began an extra-  
6 marital affair, which continued through August 2008. In a Senate Ethics Committee deposition,  
7 Cynthia Hampton testified that around April 1, 2008, after the Ensign and Hampton families  
8 learned about the affair, it became evident that she and Doug Hampton would have to leave their  
9 jobs.<sup>16</sup> Senator Ensign and Doug Hampton then negotiated an "exit strategy" to end the  
10 employment relationship.<sup>17</sup>

11 On April 2, Doug Hampton and Senator Ensign had three conversations to discuss this  
12 exit plan.<sup>18</sup> Doug Hampton took detailed notes. Dated "4/2/08," they provide a  
13 contemporaneous account of the negotiations.<sup>19</sup> During her deposition, Cynthia Hampton

<sup>14</sup> *Id.* at 10-11, 21, Ex. ME-2; Report at 45.

<sup>15</sup> Cynthia Hampton Dep. at 57-63, 80-81, 106-07.

<sup>16</sup> *See id.* at 201-02, 214.

<sup>17</sup> *Id.*

<sup>18</sup> *See id.* at 204-06, 208, 210-14, Ex. CH-10.

<sup>19</sup> *See id.*, Ex. CH-10; *see also* Eric Lichtblau and Eric Lipton, *Senator's Aid After Relationship Raises Flags Over Ethics*, N.Y. TIMES, Oct. 2, 2009 (describing contemporaneous notes and further describing course of negotiations between Senator Ensign and Hamptons regarding severance payment to leave jobs with Senate office and Ensign Committees), available at [http://www.nytimes.com/2009/10/02/us/politics/02ensign.html?\\_r=2&scp=1&sq=Ensign%20Hampton&st=cse&](http://www.nytimes.com/2009/10/02/us/politics/02ensign.html?_r=2&scp=1&sq=Ensign%20Hampton&st=cse&).

1 verified that the notes were in Doug Hampton's handwriting and stated that he "would always  
2 record everything."<sup>20</sup>

3 The first of the three April 2 discussions occurred at 9:40 a.m., and the notes of this  
4 discussion state: "Exit strategy and *severance* for Cynthia, Exit strategy and *severance* for Doug,  
5 Communication Plan for NRSC and official office, NO CONTACT WHAT SO EVER [*sic*]  
6 WITH CINDY!"<sup>21</sup> The notes reflect that the second conversation took place at noon. At that  
7 time, Senator Ensign and Doug Hampton discussed a plan to obtain clients for Doug Hampton in  
8 his new work, with the notes recording: "We discussed timing of departure[;] JE [John Ensign]  
9 agreed for me to stay on thru April—Better for client building."<sup>22</sup> Finally, the notes describe a  
10 third conversation at 7:30 p.m., during which Senator Ensign proposed specific details about the  
11 nature and amount of the proposed payment to the Hamptons:

12 John called asked if it was OK to share the outlines of a plan.

13 —Doug ~ 2 mn. *severance*, continue client building

14 —Cindy ~ 1 year *salary*

15 —Discussed gift rules and tax law

16 —Shared a plan to have both he and Darlene write ck's in various  
17 amounts equaling 96K.

18 He asked if the offer was OK and did I agree—I said I would need to think about  
19 and would get back with him.<sup>23</sup>

20 **B. The \$96,000 Payment**

21 Cynthia Hampton testified that, during the first week of April, Senator Ensign told her the  
22 check had been written and described how the amount was calculated:

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<sup>20</sup> See Cynthia Hampton Dep. at 204. While the 2009 *New York Times* article described Doug Hampton's notes and copies of them were publicly available at that time, the Senate Ethics Committee authenticated the notes during Cynthia Hampton's deposition testimony.

<sup>21</sup> *Id.*, Ex. CH-10 (emphasis added).

<sup>22</sup> *Id.*, Ex. CH-10;

<sup>23</sup> See Michael Ensign Dep., Ex. ME-7;

1 [Senator Ensign] did contact me and tell me the check was written because . . .  
2 when Doug and him had a meeting, . . . they had talked that we both have to stop  
3 working there, John . . . told Doug and myself that he would give me—at first he  
4 told me two years *severance pay* and Doug . . . I don't remember if it was a month  
5 *severance pay*. . . . I don't recall, because it didn't make sense to me, because  
6 then [when the check arrived] I got one year's *severance pay*, which was the  
7 \$50,000. And I remember if it was one or two months' salary for Doug, that . . .  
8 there was extra money, and I said, well, if it's . . . one year for me and one or two  
9 months, whatever it was for Doug, what's the extra? And he said well, you can  
10 put that towards your health insurance. You'll be getting a check from Darlene  
11 and I, is what he told me.<sup>24</sup>

12 She also recalled discussing tax consequences: "I do vaguely remember John saying that . . . he  
13 wouldn't go over a certain amount so we wouldn't have to pay taxes on it."<sup>25</sup>

14 During her deposition, Cynthia Hampton also recalled that during the period between the  
15 discussions on April 2 and her receipt of the \$96,000 check on April 9, Senator Ensign  
16 repeatedly attempted to contact her to determine whether she had received the payment. "I  
17 remember him trying to call me or e-mail me saying did you get the check yet, did you get the  
18 check yet."<sup>26</sup> When she received the check, Cynthia Hampton notified Senator Ensign "because  
19 he kept asking me, have you received the check yet?"<sup>27</sup> She also testified, "[W]hen I got it, I was  
20 surprised that it wasn't from John and Darlene, that it said Bruce Hampton, the trust fund  
21 account."<sup>28</sup>

22 Bruce Hampton, who is not related to the Hamptons, administers the Ensign 1993 Trust,  
23 which belongs to Michael and Sharon Ensign and contains the bulk of their wealth.<sup>29</sup> Bruce

<sup>24</sup> Cynthia Hampton Dep. at 202-03 (emphasis added).

<sup>25</sup> *Id.* at 211.

<sup>26</sup> *See id.* at 203-04.

<sup>27</sup> *Id.* at 212.

<sup>28</sup> *Id.* at 203-04.

<sup>29</sup> Bruce Hampton Dep. at 22-23 (Mar. 15, 2011).

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1 Hampton testified that, on April 7—five days after Senator Ensign's negotiations with Doug  
2 Hampton—Michael Ensign instructed him to write a \$96,000 check from the Ensign 1993 Trust  
3 account to Doug and Cynthia Hampton and two of their three children.<sup>30</sup>

4 **C. Senator Ensign's Discussion with his Father and the \$96,000 Check to the**  
5 **Hamptons from the Ensign 1993 Trust Account**

6 Recalling the events of early April 2008, Senator Ensign wrote in his journal in June  
7 2009—just over a year after the payment and at the time when the affair was becoming public—  
8 that because he and Cynthia Hampton had been caught several times, "finally all agreed that  
9 Doug and Cindy would have to leave my employ."<sup>31</sup> Ensign then described his desire to pay a  
10 severance and his discussion with his father Michael Ensign about making a payment to the  
11 Hamptons:

12 I did not want the government to have to pay any severance pay[,] or the  
13 campaign, so I was going to help them transition into their new life. *I went to my*  
14 *dad, and he said he would rather give them some money as a gift to help them out.*  
15 *He had Bruce write a check for about \$100,000.*<sup>32</sup>

16 Asked about this conversation during his deposition, Michael Ensign ultimately could not  
17 recall whether Senator Ensign asked him to make this payment to the Hamptons. Michael  
18 Ensign first testified, "No one at any time asked me to pay anybody anything, period. My wife  
19 and I decided to give that money to the Hampton family because we were very concerned about  
20 this whole situation and primarily our grandchildren and the Hampton children."<sup>33</sup> But after  
21 reviewing Senator Ensign's journal entry, excerpted above, which is to the contrary, Michael

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<sup>30</sup> *Id.* at 106.

<sup>31</sup> Michael Ensign Dep., Ex. ME-10 at 1.

<sup>32</sup> *Id.* (emphasis added).

<sup>33</sup> Michael Ensign Dep. at 96.



1 Ensign testified that he could not recall a conversation with his son about a “need to compensate  
2 [the Hamptons] in some way for the damage that was being caused to them by the loss of their  
3 jobs.” He continued, “I don’t recall a conversation. . . . He [Senator Ensign] may have  
4 mentioned it. I can honestly tell you today, I don’t recall him saying that to me.”<sup>34</sup> When Senate  
5 Ethics Committee counsel tried to elicit other details about how Michael Ensign, rather than his  
6 son, came to be the source for the payment—asking, for instance, whether he learned that his son  
7 intended to pay the Hamptons as a gift and then offered to make the payment himself because of  
8 his superior financial position—Michael Ensign again could not recall but insisted the payment  
9 was a gift:

10 It was just intended as a gift, so I don’t recall what we were thinking. . . . The  
11 intent of that was just to give primarily for the concern over those kids. That’s  
12 exactly what it was. And that’s what the intent was, as far as I’m concerned,  
13 okay.<sup>35</sup>

14 Michael Ensign also testified that after he learned of the affair he “had assumed” but “wasn’t  
15 told” that Doug and Cindy Hampton would no longer work for Senator Ensign going forward.<sup>36</sup>

16 Asked about these same issues, Michael Ensign’s wife and Senator Ensign’s mother  
17 Sharon Ensign testified that she and her husband were concerned about the lost income the  
18 Hamptons would suffer after leaving their jobs and the impact that would have on the Hampton  
19 children:

20 Q: . . . [A]fter meeting with John, do you recall the sequence of events of  
21 what happened next leading up to your husband directing Bruce Hampton to write  
22 a check to the Hamptons?

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<sup>34</sup> *Id.* at 106.

<sup>35</sup> *Id.* at 105-06.

<sup>36</sup> *Id.* at 81-82.

1           A: . . . [M]y husband suggested it. And . . . obviously, we knew about the  
2           affair and knew that . . . they were . . . obviously going to have to seek  
3           employment elsewhere. And just—it was the right thing to do so that . . . their  
4           children would not, you know, have to leave their schools or anything else.<sup>37</sup>

5           Sharon Ensign also stated that she “did not recall ever discussing” a potential severance with  
6           Senator Ensign and that Senator Ensign never asked for a check to serve as severance.<sup>38</sup> Sharon  
7           and Michael Ensign both testified that they never communicated with Cynthia or Doug Hampton  
8           about the payment, whether to convey their concern or for any other purpose.<sup>39</sup>

9           **D.       Senator Ensign Repeatedly Referred to the Payment as “Severance”**

10          Members of Senator Ensign’s Senate office staff testified that Senator Ensign repeatedly  
11          referred to the planned payment as “severance,” or as related to the Hamptons’ lost employment,  
12          during the time leading up to public disclosure of the affair in June 2009:

- 13           • Rebecca Fisher, Senator Ensign’s Communications Director: “[H]e had just said  
14           that he had taken care of Doug with what he had thought was pay, was fair pay,”  
15           and “[H]e had said a couple times, ‘I was trying to make them whole, I was trying  
16           to be fair, I was trying to *make sure they were taken care of after he left the*  
17           *office’ . . . .”<sup>40</sup>*
- 18           • Ernestine Jackson, Senator Ensign’s Deputy Chief of Staff: “I recall him saying  
19           that he gave them money out of his own pocket for a few months—he said for a  
20           few months *to cover his salary and her salary and COBRA payments.*”<sup>41</sup>
- 21           • Pamela Thiessen, Senator Ensign’s Legislative Director: “He said he had paid  
22           *severance* to the Hamptons, and he talked about a number of different things it  
23           included, including enough money for COBRA benefits.”<sup>42</sup>

37       Sharon Ensign Dep. at 45.

38       *Id.* at 47-48, 52-53.

39       *Id.* at 44-45; Michael Ensign Dep. at 109-10.

40       Rebecca Fisher Dep. at 34, 45 (Jul. 6, 2010) (emphasis added).

41       Ernestine Jackson Dep. at 223 (Jul. 1, 2010) (emphasis added).

42       Pamela Thiessen Dep. at 87 (Jun. 16, 2010) (emphasis added).

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1           The Report also recounts that other witnesses testified about Senator Ensign's  
2 contemporaneously expressed purpose to pay the Hamptons severance. For instance, a long-time  
3 spiritual advisor to Senator Ensign reportedly testified that when he spoke with Senator Ensign  
4 about the payment to the Hamptons, Senator Ensign stated, "I'm going to give him as much  
5 *severance* as possible." Similarly, Mike Slanker, a former Ensign campaign manager, reportedly  
6 testified that Senator Ensign told him, "[W]e gave Cindy \$100,000 *severance* to help them."<sup>43</sup>

7           And multiple drafts of a public statement concerning the affair, which Senator Ensign  
8 prepared with help from his staff, described the payment to the Hamptons as severance:

9           Because of the affair, an unsustainable work atmosphere had developed and it  
10 became apparent they could no longer work for me. To help them transition to  
11 new work, we gave them what was the equivalent of 6 months['] *severance* pay  
12 and 1 year of health insurance expense—personally, not out of campaign or  
13 official accounts.<sup>44</sup>

14          According to the Report, another draft of the public statement circulated to key Ensign staff  
15 members by e-mail included similar "severance" language. In this draft, however, Senator  
16 Ensign claimed that he and his wife made the payment: "Last year, my wife and I decided to  
17 give what would be the equivalent of six months['] *severance* to each of them out of our personal  
18 funds. Let me be clear: These were strictly personal funds. This was to get them transitioned  
19 into new work."<sup>45</sup>

20          Senator Ensign made the decision to remove all references to the payment from his public  
21 statement less than two hours before releasing it on June 16, 2009. He did so only after his  
22 lawyer informed a member of Senator Ensign's staff that Senator Ensign could have legal

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<sup>43</sup> Report at 39, 56 (emphasis added).

<sup>44</sup> Referral, Tab 10 (first draft of Senator Ensign's public statement); *see also* Tab 11 (second draft of Senator Ensign's public statement) (emphasis added).

<sup>45</sup> Report at 40-41 (emphasis added).

1 exposure if the payment to the Hamptons was perceived to be a "severance."<sup>46</sup> Senator Ensign's  
2 attorney counseled him not to describe the payment directly in relation to the termination of the  
3 Hamptons' employment, but to use more opaque language so that Senator Ensign could later  
4 mount a defense, if necessary:

5 This statement, as currently written, raises a host of potential criminal issues for  
6 the Senator. *The language draws a direct connection between the affair, the*  
7 *termination of the staffers, and the "severance payment."* Although the statement  
8 attempts to legitimize the reason for the payment, it's awfully odd that he made  
9 the payments from personal funds.

10 . . . .  
11 The Hamptons may very well come back with more information regarding the  
12 payments, *but the Senator can dispute the charges on our terms (essentially*  
13 *stating that the Senator made the payments because he regretted his actions and*  
14 *wanted to make amends, but would not play Doug Hampton's game of criminal*  
15 *extortion.)*<sup>47</sup>

16 As the Report explains, the first time Senator Ensign publicly acknowledged a payment  
17 to the Hamptons was also the first time it was described as a gift from Michael and Sharon  
18 Ensign. In a public statement issued on July 9, 2009—after Doug Hampton stated in a media  
19 interview that his wife received a payment from Senator Ensign—Senator Ensign's attorneys  
20 said, on his behalf, "The payments were made as *gifts*, accepted as gifts and complied with tax  
21 rules governing gifts. After the Senator told his parents about the affair, his parents decided to

<sup>46</sup> See Rebecca Fisher Dep. at 112; Referral, Tab 16 (E-mail from Chris Gober, Esq., to Rebecca Fisher (Jun. 16, 2009, 3:26 p.m.)). According to the Senate Ethics Committee, the e-mail from counsel was sent to a shared commercial internet-based email address of a third party—Senator Ensign's then-Communications Director and her husband—not Senator Ensign, and thus was not privileged. Senator Ensign reportedly abandoned his claim of privilege in February 2011 after the Senate Ethics Committee challenged it. Report at 41. Counsel for Senator Ensign has not asserted any claim of privilege regarding this e-mail in this proceeding, notwithstanding his notice of the Referral from the Ethics Committee.

<sup>47</sup> Referral, Tab 16 (E-mail from Chris Gober, Esq., to Rebecca Fisher (Jun. 16, 2009, 3:26 p.m.)) (emphasis added).

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1 make gifts out of concern for the well-being of long-time family friends during a difficult  
2 time.”<sup>48</sup>

3 **E. The Asserted Pattern of “Sizeable Gifts” from Michael and Sharon Ensign to**  
4 **the Hamptons**

5 During the Senate Ethics Committee proceeding, and during the Commission’s  
6 consideration of MUR 6200 in 2010, the Ensigns attempted to establish that Michael and Sharon  
7 Ensign engaged in a pattern of gift giving to the Hampton family. The proof of that conduct  
8 centered on a vacation in Hawaii attended by Senator Ensign’s family, the family of Senator  
9 Ensign’s brother, and the Hampton family. While in Hawaii, Senator Ensign’s brother’s family  
10 and the Hampton family stayed together in a rented home and Senator Ensign’s family stayed in  
11 a private home.<sup>49</sup> Michael and Sharon Ensign provided affidavits in MUR 6200 stating:

12 Senator and Darlene Ensign, as well as Sharon and I, have made sizeable gifts to  
13 the Hampton family over the term of their shared friendship. For example,  
14 Sharon and I paid for the Hampton family to vacation in Hawaii from December  
15 26, 2006, to January 2, 2007, which included their flights on a private Gulfstream  
16 4SP jet, a rental home with its own private 9-hole golf course, food, and  
17 recreational activities. Although I have not undertaken an accounting of the total  
18 cost of the trip, I believe the costs that could be allocated to the Hamptons was at  
19 least \$30,000.<sup>50</sup>

20 After examining his affidavit during his Senate Ethics Committee deposition, however,  
21 Michael Ensign contradicted this sworn statement. He testified, “We let them use the airplane,  
22 that’s it. So I don’t recall—I don’t recall anything else there. And I absolutely did not pay

<sup>48</sup> Report at 42 (emphasis added).

<sup>49</sup> See *id.* at 45.

<sup>50</sup> Referral, Tabs 18, 19; Sen. Ensign Resp., Exs. B, C.

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1 anything in Hawaii, talking about a home and a golf course and food. No, none of that, paid  
2 nothing.”<sup>51</sup>

3 In the wake of these inconsistent statements during Michael Ensign's deposition, Sharon  
4 Ensign produced to the Senate Ethics Committee copies of two checks totaling \$50,000 from her  
5 personal checking account made out to Citibank.<sup>52</sup> She also produced two redacted pages of  
6 what appears to be Senator Ensign's Citibank MasterCard statement from January 2007 showing  
7 numerous charges for expenses incurred by those participating in the Hawaiian trip.<sup>53</sup> After  
8 receiving these documents, which were not accompanied by further explanation, the Senate  
9 Ethics Committee inferred that Sharon Ensign “may have deposited approximately \$50,000 into  
10 Senator Ensign's bank or credit card account” around the time that the Hawaiian vacation took  
11 place.<sup>54</sup> In response to the Referral, Michael and Sharon Ensign have suggested that she paid the  
12 balance on Senator Ensign's credit card bill, which Senator Ensign had used to pay for the  
13 Hamptons' vacation in Hawaii.<sup>55</sup>

14 There is evidence showing that Michael and Sharon Ensign had a long history of  
15 providing money to Senator Ensign. Michael and Sharon Ensign gave Senator Ensign \$300,000

<sup>51</sup> Michael Ensign Dep. at 103. When asked generally to explain this and other apparent contradictions between his deposition testimony and his affidavit in MUR 6200, Michael Ensign testified that he had not carefully reviewed the affidavit before signing it. *Id.* at 121-22. For her part, Sharon Ensign testified during her deposition that she did not recall paying for the Hawaiian trip. See Sharon Ensign Dep. at 56-60.

<sup>52</sup> See Referral, Tab 4 (copies of checks to Citibank dated 12/21/06 and 1/07/07).

<sup>53</sup> See Referral, Tab 3 (redacted Citibank credit card bill).

<sup>54</sup> Report at 45. Sharon Ensign testified that she does not remember helping financially with the trip to Hawaii at all, and that she does not recall ever giving Senator or Darlene Ensign any checks from any source other than the Ensign 1993 Trust (though the checks submitted came from Sharon Ensign's personal checking account rather than the Ensign 1993 Trust). Sharon Ensign Dep. at 56-58. She also did not appear to have any knowledge of any specific charges that her checks may have covered. *Id.* Thus, it appears that, although Michael and Sharon Ensign ultimately paid for credit card and other expenses related to this group Hawaii trip, some of which benefited the Hamptons, they may have been unaware that they did so.

<sup>55</sup> See Parents' Resp. at 3.

1 in 2006; \$400,000 in 2007; and \$300,000 in 2008, 2009, and 2010.<sup>56</sup> Michael Ensign testified  
2 that he and his wife "try to keep all of our children at the same standard of living, and we provide  
3 the funds for that. My son Bill and my son David are wealthy people, and they make a lot of  
4 money, and my daughter and her husband and my son John and his wife do not. And we try to  
5 keep that in balance."<sup>57</sup>

6 Moreover, although Senator and Darlene Ensign had a long-standing and close-knit  
7 relationship with the Hamptons, Michael and Sharon Ensign testified that Michael Ensign did not  
8 consider Doug Hampton to be a friend.<sup>58</sup> When asked whether Michael Ensign had a "negative  
9 impression" of Doug Hampton, Sharon Ensign agreed, explaining that she thought Michael  
10 Ensign believed Doug Hampton was "an opportunist" and Michael Ensign had a "general  
11 negative feeling" about him.<sup>59</sup> Michael Ensign testified that it was fair to say he was "not  
12 terribly fond" of Doug Hampton and that his concern about Doug Hampton had to do with  
13 alleged "substance abuse problems" and his belief that Doug Hampton also allegedly "had some  
14 problems that he had taken money from a church and those type of things."<sup>60</sup> Cynthia Hampton  
15 testified that Michael Ensign's dislike of Doug Hampton went back some 20 years to an episode  
16 in which Michael Ensign felt Doug Hampton had "oversold him and wasn't honest about—

<sup>56</sup> See Report at 45; see also Michael Ensign Dep., Ex. ME-2. Michael Ensign testified that the disbursement in 2008 was not reduced by \$100,000 because of the \$96,000 payment to the Hamptons. See Michael Ensign Dep. at 28.

<sup>57</sup> Michael Ensign Dep. at 21.

<sup>58</sup> See Michael Ensign Dep. at 43 ("No, he was just a very best friend of John and Darlene's. The Hampton family was extremely close to my son John and his family"); Sharon Ensign Dep. at 38.

<sup>59</sup> Sharon Ensign Dep. at 38.

<sup>60</sup> Michael Ensign Dep. at 107-08.

1 didn't tell him the prices" in the sale of some tailored clothing, "[a]nd from that day forward, he  
2 has never liked Doug . . . . Once you're on his bad side, that's it. I call him the godfather."<sup>61</sup>

3 **F. In Response to the Referral, Senator Ensign, the Ensign Committees, and**  
4 **Michael and Sharon Ensign Argue that the \$96,000 Payment Was a Gift**  
5 **Unrelated to Cynthia Hampton's Termination from the Ensign Committees**

6 After the Commission notified the Respondents about the Referral, Senator Ensign and  
7 the Ensign Committees filed a joint response (the "Sen. Ensign Response"). It includes a  
8 number of arguments in response to the conclusions described in the Report:

- 9 • Michael and Sharon Ensign intended to give a gift, as shown by their statements  
10 in their affidavits and by the fact that they structured the payments to fit within  
11 gift tax laws.
- 12 • Whether the \$96,000 was a gift does not depend on whether Michael and Sharon  
13 Ensign had given the Hamptons a large financial gift before.
- 14 • While the donor's intent, and not the Hamptons' understanding of the nature of  
15 the payment, defines the payment, if the Hamptons believed this money to be  
16 severance, they should have declared the money as income on their tax return.
- 17 • Senator Ensign's frequent "incorrect" references to the term "severance" when  
18 referring to the payment are not determinative of Michael and Sharon Ensign's  
19 intentions.
- 20 • Variations in how witnesses described the "severance" payment in testimony to  
21 the Senate Ethics Committee should cast doubt on the reliability of characterizing  
22 the payment as a severance at all.
- 23 • These gifts would have been given irrespective of Senator Ensign's 2012 Senate  
24 candidacy, so the payment does not trigger a violation of the personal use  
25 regulations at 11 C.F.R. § 113.1(g)(6).<sup>62</sup>

26 In addition, the Sen. Ensign Response describes a history of other financial gifts from  
27 Senator and Darlene Ensign to the Hampton family.<sup>63</sup> It then goes on to state that Senator

<sup>61</sup> Cynthia Hampton Dep. at 54-55.

<sup>62</sup> Sen. Ensign Resp. at 10-21.

<sup>63</sup> *Id.* at 3-4.



1 Ensign did not request that Michael or Sharon Ensign make the payment at issue in this case, nor  
2 was there any explicit discussion that the payment would function as severance, and the payment  
3 was structured in \$12,000 increments to comply with gift tax laws.<sup>64</sup>

4 As for whether Michael and Sharon Ensign paid for the Hawaiian trip as a gift to the  
5 Hamptons, the Sen. Ensign Response contends that the checks signed by Sharon Ensign and  
6 credit card bills showing Hawaiian trip expenses—documents produced to the Senate Ethics  
7 Committee—rebut Michael Ensign's testimony denying that they paid for the trip.<sup>65</sup> The Sen.  
8 Ensign Response also asserts that Senator Ensign recalls three other occasions when he and his  
9 wife brought the Hampton family on trips and vacations using Michael and Sharon Ensign's  
10 private plane or vacation homes. Because they used the plane, the Sen. Ensign Response asserts  
11 that these other trips are additional "gifts" from Michael and Sharon Ensign to the Hampton  
12 family.<sup>66</sup>

13 Michael and Sharon Ensign filed a separate response (the "Parents' Response"), which  
14 echoes two arguments included in the Sen. Ensign Response.<sup>67</sup> First, it contends that Senator  
15 Ensign's numerous descriptions of the payment as a severance or in terms that directly tie the

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<sup>64</sup> See *id.* at 4.

<sup>65</sup> *Id.* at 8-9.

<sup>66</sup> See *id.* at 10 n.5. Notably, the Sen. Ensign Response does not contend that Michael or Sharon Ensign were aware that the Hamptons benefitted from the use of their plane.

<sup>67</sup> The Parents' Response includes the assertion that Michael and Sharon Ensign could not properly respond to the notification in this matter because the notification letter did not detail what new information the Commission possessed in support of the suggestion that they may have violated the Act. See Parents' Resp. at 1. At the same time, the response goes on to state, "We assume that the FEC has in its possession a copy of the Report of the Preliminary Inquiry into the Matter of Senator John E. Ensign, issued by the Special Counsel to the United States Senate Select Committee on Ethics on May 10, 2011." *Id.* at 2. Thus, the Parents' Response makes clear that Michael and Sharon Ensign were aware of the Report and the information in it. Moreover, the Respondents have vigorously defended their position that the payment was a gift, not a severance payment—the precise issue presented in the Referral. Therefore, there is no need to provide any additional information or notice to the Respondents before the Commission addresses the Referral.

1 money to the Hamptons' lost jobs are not relevant to their intent in making the payment, and they  
2 deemed it a gift.<sup>68</sup> Second, the Parents' Response makes the argument that the Senate Ethics  
3 Committee ignored the import of checks showing Sharon Ensign paid credit card bills that  
4 covered expenses for the Hawaiian vacation.<sup>69</sup>

5 Finally, both responses contend that the Commission should dismiss this matter as it did  
6 in MUR 6200 because the Senate Ethics Committee's investigation did not identify any new  
7 evidence that merits a different result in this matter.<sup>70</sup>

### 8 **III. LEGAL ANALYSIS**

#### 9 **A. The Referral Provides New Evidence that Casts Serious Doubt on the** 10 **Reliability of the Ensign Affidavits on Which the Commission Previously** 11 **Relied in its Consideration of MUR 6200**

12 In MUR 6200, the Commission exercised its discretion and dismissed the complaint for  
13 reasons that have since been overtaken by the new evidence uncovered by the Senate Ethics  
14 Committee. First, the Commission gave primary weight to the Ensigns' sworn affidavits,  
15 describing them as "the only direct evidence of their intent in making the payment."<sup>71</sup> But the  
16 evidence gathered by the Senate Ethics Committee indicates that certain representations in the  
17 affidavits were misleading.

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<sup>68</sup> See Parents' Resp. at 2.

<sup>69</sup> *Id.* at 3. To the contrary, the Report specifically discussed the checks, and the Referral included copies of them. See Referral, Tab 4 (copies of checks).

<sup>70</sup> Parents' Resp. at 1; Sen. Ensign Resp. at 1-2.

<sup>71</sup> SOR at 10-11.

1                   1.       The Notes, Journal Entry, and Other Documents Referring to the  
2                               Payment as a Severance

3               Michael, Sharon, and Senator Ensign represented that no one—and specifically not  
4       Senator Ensign—"suggested" that the payment from the Ensigns' trust account "would or should  
5       function, in form or substance," as a severance.<sup>72</sup> But Senator Ensign's journal calls the payment  
6       a "severance"; Doug Hampton's notes show the payment he was negotiating with Senator Ensign  
7       was a "severance"; and multiple drafts of Senator Ensign's public statement called it a  
8       "severance."<sup>73</sup>

9                   2.       Testimony of Cynthia Hampton and Members of Senator Ensign's Staff  
10                           Showing the Payment Was Understood to be a Severance

11               Testimony given by Cynthia Hampton and members of Senator Ensign's staff also reflect  
12       that Senator Ensign referred to the payment as a "severance" from the time he negotiated it in  
13       April 2008 until he issued a public statement disclosing the relationship, but not the payment, in  
14       June 2009, more than a year later.<sup>74</sup> Indeed, Sharon Ensign testified, "[O]bviously, we knew  
15       about the affair and knew that . . . *they were . . . obviously going to have to seek employment*  
16       *elsewhere*. And just—it was the right thing to do so that . . . their children would not, you know,  
17       have to leave their schools or anything else."<sup>75</sup>

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<sup>72</sup> Michael Ensign Aff. ¶ 8; Sharon Ensign Aff. ¶ 8; John Ensign Aff. ¶ 5.

<sup>73</sup> See Michael Ensign Dep., Ex. ME-10 (journal entry referring to payment of "severance"); Cynthia Hampton Dep., Ex. CH-10 (Doug Hampton's notes recording discussion with Senator Ensign of "severance" payment); Referral, Tab 10 (initial Ensign draft of public statement describing "severance pay" to Hamptons).

<sup>74</sup> See *supra* nn.24, 40-46 and accompanying text. In fact, Senator Ensign did not stop referring to it as a severance until his counsel advised that he drop any reference connecting a payment to the Hamptons' lost employment from his final public statement issued on June 16, 2009. See Referral, Tab 16 (e-mail from Chris Gober, Esq., to Rebecca Fisher (Jun. 16, 2009, 3:26 p.m.)). And the first time he referred to it as a gift was on July 9, 2009.

<sup>75</sup> Sharon Ensign Dep. at 45 (emphasis added).

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1           Thus, Senator Ensign's repeated references to the payment as a severance—in documents  
2 as well as discussions with multiple witnesses—and a near universal understanding of the  
3 payment to be related to Cynthia Hampton's lost job cast serious doubt on the affidavits' denial  
4 that severance was even "suggested."

5                     3.     The Evidence Showing Senator Ensign's Request that his Father  
6                     Make the Payment

7           Michael, Sharon, and Senator Ensign represented that no one—and specifically not  
8 Senator Ensign—requested that his parents "make the gifts."<sup>76</sup> Senator Ensign's own journal,  
9 however, records that Senator Ensign "went to [his] dad" about his desire to help the Hamptons  
10 by paying them a severance, and Michael Ensign responded by offering to "give them some  
11 money as a gift."<sup>77</sup> And in deposition testimony, Michael Ensign at first denied that Senator  
12 Ensign requested a payment from Michael and Sharon Ensign but then stated that Senator Ensign  
13 "may have" told Michael Ensign of his intent to make a payment to the Hamptons.<sup>78</sup> Thus, while  
14 the affidavit might be accurate in the narrow sense that Senator Ensign may not have explicitly  
15 requested that they characterize the payment as a gift, it omits the salient fact that Senator Ensign  
16 wanted to pay the Hamptons a severance and discussed it with his father.

17           Senator Ensign also represented that his parents "informed [him] that they made gifts"  
18 when the payment occurred in April 2008.<sup>79</sup> Yet Senator Ensign's journal records that it was his

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<sup>76</sup> Michael Ensign Aff. ¶ 8; Sharon Ensign Aff. ¶ 8; John Ensign Aff. ¶ 4.

<sup>77</sup> See Michael Ensign Dep., Ex. ME-10 ("I did not want the government to have to pay any severance pay or the campaign. So I was going to help them transition into their new life. I went to my dad and he said he would rather give them some money as a gift to help them out. He had Bruce write the check for about 100k. . .").

<sup>78</sup> See *id.* at 105 (saying he could not recall a conversation with Senator Ensign about paying the Hamptons but admitting that such a conversation "may have" occurred).

<sup>79</sup> John Ensign Aff. ¶ 3.

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1 idea—and not that of his parents—to make a payment.<sup>80</sup> Doug Hampton's notes reflect that it  
2 was Senator Ensign who negotiated the payment amount.<sup>81</sup> And Cynthia Hampton's testimony  
3 establishes that Senator Ensign himself arranged the payment, led her to believe he was the  
4 source of it, and was persistent in making sure it was made.<sup>82</sup> Thus, Senator Ensign was not  
5 merely "informed" of the payment as the affidavit claims; he was intimately involved in  
6 negotiating and arranging the payment and followed up to make sure the Hamptons received the  
7 check.

8 4. Michael and Sharon Ensign's Testimony Undermining the Claim that the  
9 Payment Was Part of a Pattern of Gifts to the Hamptons

10 Michael and Sharon Ensign represented that they "made sizeable gifts to the Hampton  
11 family" in the past and, as an example, said they "paid for the Hampton family to vacation in  
12 Hawaii" in December 2006.<sup>83</sup> In deposition testimony, however, Michael Ensign specifically  
13 denied paying for such a trip, and Sharon Ensign did not recall doing so.<sup>84</sup> And while documents  
14 show that Sharon Ensign wrote checks apparently paying Senator Ensign's credit card bill, which  
15 apparently included charges for the Hawaiian vacation, they do not show that those payments  
16 were for the purpose of paying for the Hamptons' trip.<sup>85</sup>

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<sup>80</sup> See Michael Ensign Dep., Ex. ME-10 (journal entry describing Senator Ensign's desire that Hampton's receive "severance" payment to "help them transition into their new life").

<sup>81</sup> See *supra* nn.19-23 and accompanying text.

<sup>82</sup> See *supra* nn.24-28 and accompanying text.

<sup>83</sup> Michael Ensign Aff. ¶ 5; Sharon Ensign Aff. ¶ 5.

<sup>84</sup> See *supra* n.51 and accompanying text.

<sup>85</sup> See *id.*

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1                   5.     Michael Ensign's Testimony Regarding the Reliability of His Affidavit

2             Michael Ensign also testified that he had "very little time" to review the affidavit  
3     prepared for him to submit to the Commission. He also acknowledged not reading it with care.<sup>86</sup>  
4     Thus, while in MUR 6200 the Ensign affidavits provided the only direct evidence of the Ensigns'  
5     reason for making the \$96,000 payment, there now is reason to doubt the credibility and  
6     reliability of those affidavits, especially insofar as they purport to explain the true nature of the  
7     payment.

8                   6.     Circumstantial Evidence Regarding the Size of the Payment

9             The second principal reason the Commission exercised its discretion to dismiss the  
10    complaint in MUR 6200 concerns the size of the payment. In MUR 6200, the Commission noted  
11    that, given the Ensign affidavits, there was an absence of other countervailing circumstantial  
12    evidence about the nature of the payment and reasoned that \$96,000—which was almost double  
13    Cynthia Hampton's annual salary—therefore was not consistent with its characterization as a  
14    severance payment.<sup>87</sup> This conclusion too has been overtaken by the evidence uncovered by the  
15    Senate Ethics Committee. Based on the evidence they gathered, the size of the payment was not  
16    inconsistent with its characterization, in part, as a severance to Cynthia Hampton. The evidence  
17    provides substantial reason to believe that the payment was severance in connection with her lost  
18    jobs with the Ensign Committees; severance for her husband's termination from Senator  
19    Ensign's Senate staff; and to maintain medical insurance.<sup>88</sup> Thus, while in MUR 6200 the  
20    Commission concluded that the size of the payment seemed to weigh against a conclusion that it

<sup>86</sup> Michael Ensign Dep. at 121-22.

<sup>87</sup> SOR at 9-10.

<sup>88</sup> See, e.g., *supra* nn.23-24, 40-42 and accompanying text.

1 was linked to Cynthia Hampton's lost employment, newly available evidence points the other  
2 way, indicating that at least part of the payment was a severance payment to Cynthia Hampton.

3 **B. A Third Party's Payment of a Political Committee's Costs for Employee**  
4 **Salaries and Expenses—Including an Employee's Severance—Is a**  
5 **Contribution Under the Act**

6 Under the Act, a "contribution" includes any gift, subscription, loan, advance, or deposit  
7 of money or anything of value made by any person for the purpose of influencing any election  
8 for federal office, or payment by any person of compensation for personal services rendered by  
9 another person without charge to a political committee for any purpose.<sup>89</sup> The Supreme Court, in  
10 a controlling opinion, has recognized that administrative support costs, which include the costs  
11 relating to committee employees, are contributions covered by the Act. As it explained in  
12 *California Medical Association v. FEC*, "[C]ontributions for administrative support clearly fall  
13 within the sorts of donations limited by [Section] 441a(a)(1)(C)."<sup>90</sup>

14 Since under the Act it is a contribution to give money to a committee so that the  
15 committee can in turn pay its administrative expenses, including committee employee salaries  
16 and related costs, it would be an in-kind contribution under the Act for a third party to pay such  
17 an expense directly.<sup>91</sup> In addition, "Expenditures made by any person in cooperation,

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<sup>89</sup> 2 U.S.C. § 431(8)(A).

<sup>90</sup> *Cal. Med. Ass'n v. FEC*, 453 U.S. 182, 198 n.19 (1981) (plurality opinion). Though a plurality, the concurrence and dissent diverged on grounds unrelated to the present issue, *i.e.*, the treatment of administrative support costs as contributions under the Act. *See Cal. Med.*, 453 U.S. at 201-09. Subsequently, in *Colorado Republican Federal Campaign Comm. v. FEC*, another plurality of seven justices cited *California Medical* for the proposition that the Court previously upheld such contribution limitations for PACs. *See* 518 U.S. 604, 617 (1996) (plurality opinion).

<sup>91</sup> *See, e.g.*, MUR 5408 (Sharpton) (2005) (finding reason to believe candidate and committee accepted impermissible in-kind contributions when third party subsidized salaries of certain committee employees); MUR 6023 (John McCain 2008, *et al.*) (arguing that a third party's payment of severance to former employee who was working for committee is in-kind contribution to committee if payment is not for *bona fide* services to third party). *Cf.*

1 consultation, or concert with, or at the request or suggestion of, a candidate . . . shall be  
2 considered to be a contribution to such candidate."<sup>92</sup>

3 So, if the \$96,000 payment—or some portion of it—constitutes an administrative-  
4 support-cost contribution, then the payment, or the portion that is a contribution, must comply  
5 with the Act's contribution limits and reporting requirements. Under the Act, no person may  
6 make a contribution to any candidate and his or her authorized political committee, such as the  
7 Ensign for Senate Committee, exceeding \$2,000 (adjusted for inflation).<sup>93</sup> Likewise, no person  
8 may contribute more than \$5,000 per year to a leadership PAC, such as the Battle Born PAC.<sup>94</sup>  
9 A committee's knowing receipt of any excessive contribution is a violation of Section 441a(f).  
10 Finally, a committee's failure to report receiving a contribution is a violation of Section 434(b).

11 Consequently, if the payment to the Hamptons was, at least in part, a payment for, among  
12 other things, the loss of Cynthia Hampton's job as treasurer to the Ensign Committees, then the  
13 amount attributable to that purpose that exceeds the Act's contribution limits would be an  
14 excessive contribution that the Ensign Committees were not permitted to accept.<sup>95</sup> And the  
15 Ensign Committees' failure to report the contribution would be a violation of its disclosure

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MUR 6463 (Antaramian) (2012) (providing committee with office space and related office services constituted contribution to committee).

<sup>92</sup> 2 U.S.C. § 441a(a)(7)(B)(i). Under the Act, the term "expenditure" includes any direct or indirect payment, distribution, loan, advance deposit, or gift of money, or any services, or anything of value, made by any person for the purpose of influencing any election for federal office. *Id.* § 431(9)(A)(i).

<sup>93</sup> *Id.* § 441a(a)(1)(A). During the 2007-2008 election cycle, the limit on individual contributions to candidates was \$2,300 per person. See FEC, *Contribution Limits for 2007-2008*, Party Guide Supplement at 16 (Aug. 2007), available at [http://www.fec.gov/info/PartyGuide/party\\_guide\\_sapp.pdf](http://www.fec.gov/info/PartyGuide/party_guide_sapp.pdf).

<sup>94</sup> 2 U.S.C. § 441a(a)(1)(C).

<sup>95</sup> *Id.* §§ 441a(a) and (f).

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obligations under the Act.<sup>96</sup> Thus, the central question in this case is whether the payment was, at least in part, a severance and therefore a contribution under the Act.

**C. The Payment Was a Severance Because it Was Meant to Compensate the Hamptons for the Loss of Their Jobs with Senator Ensign's Office and the Ensign Committees**

The information gathered by the Senate Ethics Committee and submitted with its Referral demonstrates that Senator Ensign wanted to provide funds to the Hamptons, in part, to ease Cynthia Hampton's transition from her position with the Ensign Committees.

In MUR 6200, the Commission looked to *Commissioner of Internal Revenue v. Duberstein*, 363 U.S. 278 (1960), a case interpreting the statutory meaning of "gift" under the tax code, for guidance in determining whether a particular payment should be treated as a personal gift or a campaign contribution under the Act. In *Duberstein*, the Supreme Court concluded that the term "gift" has a specific meaning in the tax code and that determining whether a payment is, in fact, a gift for federal tax purposes requires an objective inquiry to determine what the payment actually was, regardless of what the payor might have called it:

A gift in the statutory sense . . . proceeds from a detached and disinterested generosity, . . . out of affection, respect, admiration, charity or like impulses. And in this regard, the most critical consideration, as the Court was agreed in the leading case here, is the transferor's intention. What controls is the intention with which payment, however voluntary, has been made.

. . . .

*The donor's characterization of his action is not determinative— . . . there must be an objective inquiry as to whether what is called a gift amounts to it in reality. It scarcely needs adding that the parties' expectations or hopes as to the tax treatment of their conduct in themselves have nothing to do with the matter.*<sup>97</sup>

<sup>96</sup> *Id.* § 434(b).

<sup>97</sup> *Duberstein*, 363 U.S. at 285-86 (citations and internal quotation marks omitted) (emphasis added).

1 Notably, the *Duberstein* Court was careful to explain that by using the word "intention" it was  
2 referring to "the basic reason for his [the payor's] conduct in fact—the dominant reason that  
3 explains his action in making the transfer."<sup>98</sup> And thus the question is "basically one of fact, for  
4 determination on a case-by-case basis."<sup>99</sup>

5 Guided by *Duberstein*'s discussion of a fact-based objective inquiry, the Commission  
6 previously said, "In addition to [the Ensigns'] affidavits, the Commission may consider other  
7 evidence, including the circumstances in which the payment was made, to discern the Ensigns'  
8 intent."<sup>100</sup> We believe that, with the benefit of substantial new evidence, a *Duberstein*-like  
9 objective inquiry leads to the conclusion that the dominant reason for the \$96,000 payment was  
10 to compensate the Hamptons for having to sever their employment relationship with Senator  
11 Ensign and the Ensign Committees. There is strong evidence that it was a "severance  
12 payment"—i.e., a "payment by an employer to employee beyond his wages on termination of his  
13 employment."<sup>101</sup>

14 First, the evidence shows that the payment was meant to help the Hamptons after losing  
15 their jobs with the Ensign Committees (in Cynthia's case) and Senator Ensign's Senate office (in  
16 Doug's case). Sharon Ensign testified that she and Michael Ensign knew about the job losses

<sup>98</sup> *Id.* at 286. Thus, *Duberstein* does not necessarily require an inquiry of the transferor's precise legal *mens rea*—i.e., intention or motivation—as may be required in other contexts, but rather calls for a broad consideration "based ultimately on the application of the fact-finding tribunal's experience with the mainsprings of human conduct to the totality of the facts of each case." *Id.* at 289.

<sup>99</sup> *Id.* at 290.

<sup>100</sup> SOR at 10 (quoting *Duberstein*, 363 U.S. at 286).

<sup>101</sup> *Ass'n of Am. R.R.s v. Surface Transp. Bd.*, 162 F.3d 101, 104 (D.C. Cir. 1998) (internal citation omitted). Cf. *Fort Halifax Packing Co., Inc. v. Coyne*, 482 U.S. 1, 4 (1987) (treating as "severance payment" a one-time, lump-sum payment to certain employees to assist them in economic transition in event of plant closure).

1 and were particularly concerned about the impact on the Hamptons's children.<sup>102</sup> According to  
2 Senator Ensign's journal, he also meant for the payment to compensate the Hamptons for their  
3 job losses and went to his father about it.<sup>103</sup> And Senator Ensign's staff members and others  
4 recall Senator Ensign explaining that he had given the Hamptons money "to cover his salary and  
5 her salary and COBRA payments."<sup>104</sup>

6 *Second*, it was Senator Ensign—the Hamptons' employer—who was the driving force  
7 behind the payment. He negotiated the payment as part of an "exit strategy."<sup>105</sup> They agreed on  
8 an amount—\$96,000—that was calculated based on the Hamptons' salaries and an additional  
9 amount to cover lost healthcare benefits. Senator Ensign told Michael Ensign of his intention to  
10 pay the Hamptons. And it is reasonable to infer that it was this discussion that led to Michael  
11 Ensign's direction to Bruce Hampton to issue a check to the Hamptons in the precise amount  
12 Senator Ensign had negotiated with Doug Hampton. Indeed, Senator Ensign told Cynthia  
13 Hampton he was sending her a check, suggested it was from him and his wife, and repeatedly  
14 followed up to make sure she received it—all of which indicates that Senator Ensign knew his  
15 parents had made a payment to the Hamptons.<sup>106</sup> So, while the check was signed by Bruce  
16 Hampton and drawn on the Ensign Trust account, the catalyst and prime mover was Senator  
17 Ensign, who negotiated the amount, discussed it with his parents, and then ensured the Hamptons

<sup>102</sup> Sharon Ensign Dep. at 45 ("[M]y husband suggested it. And . . . obviously, we knew about the affair and knew that . . . they were . . . obviously going to have to seek employment elsewhere. And just—it was the right thing to do so that . . . their children would not, you know, have to leave their schools . . ."); accord Michael Ensign Dep. at 81-82 (testifying he "had assumed" the Hamptons would no longer work for Senator Ensign).

<sup>103</sup> See Sharon Ensign Dep., Ex. SE-7 at 1; Michael Ensign Dep., Ex. ME-10 at 1 ("[F]inally all agreed that Doug and Cindy would have to leave my employ. . . . [S]o I was going to help them transition into their new life.").

<sup>104</sup> Ernestine Jackson Dep. at 223.

<sup>105</sup> See Cynthia Hampton Dep., Ex. CH-10.

<sup>106</sup> See Cynthia Hampton Dep. at 203-04, 212.

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1 received the check.<sup>107</sup> For this reason, Senator Ensign's treatment of the payment as a severance  
2 is particularly probative of what the payment was in reality, regardless of what it was later called.

3 *Third*, Senator Ensign repeatedly referred to the payment as a "severance." His journal  
4 calls it a severance.<sup>108</sup> Doug Hampton's notes of his discussions with Senator Ensign call it a  
5 severance.<sup>109</sup> Testimony also reflects that Senator Ensign consistently referred to the payment as  
6 a severance in discussions with Cynthia Hampton in April 2008 and again when he disclosed the  
7 relationship to his staff in June 2009, more than a year later. And Senator Ensign's draft public  
8 statement called it a severance.<sup>110</sup> The fact that Senator Ensign's lawyer advised him  
9 immediately before he made a public statement to stop referring to the payment as a severance  
10 because of the potential legal implications also strongly suggests that the present characterization  
11 of the payment as a gift is merely a *post hoc* legal position, which warrants little weight in an  
12 objective inquiry "as to whether what is called a gift amounts to it in reality."<sup>111</sup>

13 **D. The Respondents' Arguments that the Payment Was a Gift, Not a Severance,**  
14 **Are Not Persuasive**

15 In essence, the Respondents' various arguments boil down to the claim that the payment  
16 was meant as a gift instead of a severance. The record now before the Commission, however,  
17 does not support this claim. Instead, it supports the conclusion that the payment was meant to be  
18 a severance. Indeed, the only documentary evidence suggesting that the payment was a gift—

<sup>107</sup> Indeed, even Senator Ensign's counsel recognized that Senator Ensign was behind the payment—writing, for example, "*the Senator made the payments because he regretted his actions and wanted to make amends . . .*"—while also counseling that it not be called a severance for strategic reasons. Referral, Tab 16 (emphasis added).

<sup>108</sup> See Michael Ensign Dep., Ex. ME-10 (journal entry referring to payment of "severance").

<sup>109</sup> Cynthia Hampton Dep., Ex. CH-10 (Doug Hampton's notes recording discussion with Senator Ensign of "severance" payment).

<sup>110</sup> Referral, Tab 10 (initial Ensign draft of public statement describing "severance pay" to Hamptons).

<sup>111</sup> *Dubenstein*, 363 U.S. at 286.

1 Senator Ensign's counsel's public statement issued July 9, 2009, and Michael and Sharon  
2 Ensign's 2010 affidavits, each calling the payment a gift—were created long after the payment  
3 was made and are contradicted by earlier, often contemporaneous, documents as well as by  
4 sworn testimony.

5 The Sen. Ensign Response argues that the payment was a gift because the check was  
6 made out to the Hamptons and two of their children from the Ensign Trust account and was  
7 structured to provide each recipient with the maximum amount allowable under federal tax law.  
8 But, as the *Duherstein* Court pointed out, "It scarcely needs adding that the parties' expectations  
9 or hopes as to the tax treatment of their conduct in themselves have nothing to do with the  
10 matter."<sup>112</sup> Instead, what is important in determining whether a payment was a gift or a  
11 severance is whether the payment was rooted in "detached and disinterested generosity, . . . out  
12 of affection, respect, admiration, charity, or like impulses"<sup>113</sup> or, on the other hand, was meant to  
13 serve some other purpose, such as to lessen the impact of a job loss.

14 Here, the record shows that Senator Ensign, Sharon Ensign, the Hamptons, and several  
15 others understood that the payment was tied to the Hamptons' lost employment. The amount of  
16 the check was the same as the amount Senator Ensign had negotiated with Doug Hampton after  
17 Senator Ensign had discussed with Michael Ensign his intention to pay a severance. And Doug  
18 Hampton was included as a recipient of the payment, even though he is someone for whom  
19 Michael Ensign does not appear to have much "affection, respect, [or] admiration," while at the  
20 same time, the Hamptons' third child was not included. Thus, the circumstances do not appear

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<sup>112</sup> *Id.* at 286.

<sup>113</sup> *Id.*

1 to indicate "detached and disinterested generosity"—they tend to show that the payment was a  
2 severance.

3 *Second*, the Respondents' claim that Michael and Sharon Ensign paid for the Hamptons'  
4 Hawaiian vacation, which they argue supports the conclusion that the \$96,000 payment was part  
5 of a pattern of gift-giving to the Hamptons. But the documents Sharon Ensign produced to the  
6 Senate Ethics Committee do not show a gift given to the Hamptons; they show that Sharon  
7 Ensign simply paid Senator Ensign's credit card bill, which included expenses from the  
8 Hawaiian trip.<sup>114</sup> And, more fundamentally, even if we accept for the sake of argument that  
9 paying Senator Ensign's credit card bill did reflect Michael and Sharon Ensign's pattern of gift  
10 giving to the Hamptons, the \$96,000 payment at issue here does not fit that pattern. It was paid  
11 from the Ensign Trust account—not a personal check to cover expenses already incurred—and at  
12 \$96,000, it was nearly double the size of the entire Hawaiian vacation and three times as much as  
13 the asserted value of the Hamptons' share of that trip. Though it does not fit the asserted pattern  
14 of gift giving, the amount does match precisely the amount Senator Ensign negotiated with Doug  
15 and Cynthia Hampton, which was calculated based on their salaries and Cynthia Hampton's  
16 healthcare needs in direct relation to the loss of their jobs.

17 *Third*, Respondents argue that Senator Ensign's and others' characterizations of the  
18 payment as a severance are not determinative and, because there is variation among witnesses  
19 about the terms of the alleged severance, they are not reliable indicators of the purpose of the  
20 payment. The depositions, however, are consistent in showing that the payment made to the

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<sup>114</sup> Notably, Respondents do not explain why the Hamptons' participation in the Hawaiian vacation was worth \$30,000, and the Ethics Committee concluded that this valuation was inconsistent with other evidence showing that the trip for 16 people cost around \$43,000. *See* Report at 44-45 (noting inconsistency particularly since Hamptons traveled on same family jet as the other vacationers and stayed in a home rented for Ensign's brother and his family).

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1   Hamptons was meant to compensate them for the loss of their jobs.<sup>115</sup> Available documents—  
2   including the draft public statement and Senator Ensign's journal entry—reflect that the payment  
3   was meant as a severance and that Senator Ensign discussed the payment with Michael Ensign  
4   before the payment was made. This conclusion is also supported by Senator Ensign's  
5   conversations with Cynthia Hampton in which he asked whether she had yet received the  
6   payment, thereby showing he knew of the payment beforehand. On the other hand, the  
7   characterizations of the payment as a gift emerged only in response to public scrutiny long after  
8   the payment was made. They therefore resemble *post hoc* rationalizations, which are of  
9   questionable reliability when weighed against the substantial volume of evidence tending to  
10   show that the payment was meant to compensate the Hamptons for the loss of their jobs.<sup>116</sup>

11           **E.     There Is Reason to Believe that There Was an Excessive, Unreported, In-**  
12           **Kind Contribution to the Ensign Committees Because \$72,000 of the \$96,000**  
13           **Payment Is Attributable to Cynthia Hampton's Lost Job with the Ensign**  
14           **Committees**

15           As discussed above, an objective inquiry into the nature of the \$96,000 payment indicates  
16   that it was a severance, but only the portion of that payment related to Cynthia Hampton's lost  
17   job with the Ensign Committees would be a contribution under the Act. Based on Cynthia  
18   Hampton's deposition testimony, notes from Doug Hampton's conversation with Senator Ensign,  
19   and the Report, we believe that approximately \$50,000 of the total payment represented one

<sup>115</sup> Cynthia Hampton Dep. at 202-03; Ernestine Jackson Dep. at 223; Pamela Thiessen Dep. at 87.

<sup>116</sup> See *La Botz v. FEC*, No. 11-1247, 2012 WL 3834865, \*6-8 (D.D.C. Sept. 5, 2012) (reversing and remanding Commission decision relying on affidavit not supported by personal knowledge and contradicted by other contemporaneous written evidence).

1 year's salary for her, approximately \$24,000 represented two months' salary for him, and the  
2 balance—\$22,000—represented a payment for her lost health insurance.<sup>117</sup>

3 Given its size, the Cynthia Hampton severance payment exceeds four separate  
4 contribution limits—the Michael and Sharon Ensign's per-person limits for the two Ensign  
5 Committees—by a total of \$57,400 (\$50,000 severance amount, plus \$22,000 health insurance  
6 amount, minus \$14,600 combined contribution limit), as follows:

	Contribution to Senator Ensign and Ensign for Senate	Contribution to Battle Born PAC	Total
	\$2,300 per-person limit	\$5,000 per-person limit	
Michael Ensign	\$18,000	\$18,000	\$36,000
	\$15,700 over limit	\$13,000 over limit	\$28,700 exceeds limits
Sharon Ensign	\$18,000	\$18,000	\$36,000
	\$15,700 over limit	\$13,000 over limit	\$28,700 exceeds limits
Total	\$36,000	\$36,000	\$72,000
	\$31,400 over limit	\$26,000 over limit	\$57,400 exceeds limits

7 Thus, there is reason to believe that Michael and Sharon Ensign made excessive contributions in  
8 violation of 2 U.S.C. § 441a(a)(1)(A) and (C), and Senator Ensign<sup>118</sup> and the Ensign Committees  
9 knowingly accepted excessive contributions in violation of 2 U.S.C. § 441a(f). Finally, the  
10 Ensign Committees also were required to disclose the in-kind contributions on the contribution  
11 and expenditure schedules of their disclosure reports filed with the Commission, in accordance

<sup>117</sup> The Sen. Ensign Response argues that, because of its size, the payment would have violated the personal use regulations at 11 C.F.R. § 113.1(g)(6) if the Ensign Committees had treated it as an in-kind contribution. The evidence of negotiation between Doug Hampton and Senator Ensign and Senator Ensign's subsequent discussions with Cynthia Hampton reveal that part of the \$96,000 sum was meant as severance for Cynthia Hampton's lost employment with the Ensign Committees and the remainder was for Doug Hampton's lost employment. As discussed, the relevant amount under the Act is based on the amount attributable to Cynthia Hampton's severance—\$72,000—which is a cost of the Ensign Committees, and therefore related to Senator Ensign's candidacy (*i.e.*, not irrespective of it), so we do not recommend finding reason to believe that there was a personal-use violation.

<sup>118</sup> In light of his key role in negotiating, arranging, and confirming receipt of the \$96,000 payment, there is reason to believe that Senator Ensign himself violated 2 U.S.C. § 441a(f), and the Ensign Committees' liability flows from his actions.

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1 with 11 C.F.R. § 104.13(a), and because they did not do so, there is reason to believe the Ensign  
2 Committees violated 2 U.S.C. § 434(b).

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14 **V. RECOMMENDATIONS**

15 1. Open a MUR in Pre-MUR 520;

16 2. Find reason to believe that Michael and Sharon Ensign each violated 2 U.S.C.  
17 § 441a(a)(1);

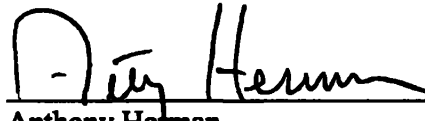
18 3. Find reason to believe that John E. Ensign, Ensign for Senate and Lisa Lisker in her  
19 official capacity as treasurer, and the Battle Born Political Action Committee and  
20 Lisa Lisker in her official capacity as treasurer each violated 2 U.S.C. § 441a(f);

21 4. Find reason to believe that Ensign for Senate and Lisa Lisker in her official capacity  
22 as treasurer and the Battle Born Political Action Committee and Lisa Lisker in her  
23 official capacity as treasurer each violated 2 U.S.C. § 434(b);

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5. Approve the attached Factual and Legal Analyses;
6. Enter into conciliation with Michael and Sharon Ensign, John Ensign, Ensign for Senate and Lisa Lisker in her official capacity as treasurer, and Battle Born Political Action Committee and Lisa Lisker in her official capacity as treasurer before a finding of probable cause to believe;
- 7.
8. Approve the appropriate letters.

Dated: 1/18/13



Anthony Herman  
General Counsel



Daniel A. Petalas  
Associate General Counsel for Enforcement



Peter G. Blumberg  
Assistant General Counsel



Leonard O. Evans III  
Attorney, Enforcement Division

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